FILE COPY

JUL 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

PETITION FOR REHEARING

CHARLES R. VOLK
CHARLES WEISS
RALPH T. DESTEFANO
Attorneys for Petitioner

Of Counsel:

ROBERT H. SHOOP, JR.
CARL H. HELLERSTEDT, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY, *Petitioner,*

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,

AND

THE NATIONAL ORGANIZATION FOR WOMEN, INC., *Respondents.*

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

---

PETITION FOR REHEARING

Comes now the Pittsburgh Press Company, petitioner, pursuant to Rule 58(1) and for grounds for its petition for a rehearing on this Court's decision entered herein on June 21, 1973, respectfully states:

1. By holding that the editorial discretion and judgment exercised by the Pittsburgh Press in arranging the layout and format of advertising is not entitled to First Amendment protection, this Court has inadvertently provided states, counties and municipalities with awesome and devastating power sufficient to

choke off the economic lifeblood of newspapers an destroy the press.

History has shown that a strong and free press dependent from government is our great protecto individual liberty. In performing this role, the p is often called upon to inform the public of the act or inaction of government, whether or not it be f eral, state or local. Experience has also shown t political figures and political bodies subject to p scrutiny seek to retaliate against an unfavora press. *Grosjean v. American Press Co.*, 297 U.S. (1936). As Mr. Justice Stewart said in his dissent this case, "The camel's nose is in the tent." Gi the tool they have sought, county and city counc boards and commissions may now, if they choose, en an infinite variety of laws and ordinances regulati a newspaper's editorial discretion in the number, si placement, and content of ads, all under the guise police power. This Court has now held that the e torial judgment related to those matters falls fr First Amendment protection and is reduced to t status of an unprotected "commercial statement" cause the ultimate publication conveys a commerc message. It is now certainly conceivable that t enemies of the press on state and local levels cou for instance, ban the use of advertising inserts in newspaper on the ground that such inserts tend create excessive litter; ban display advertising fr classified columns on the ground that it favors larg advertisers; and regulate as to size and format, if n totally ban from publication, advertising for any co modity, product or service which a local political bo deemed to be not in the best interest of public heal and welfare. The frightening aspect of this new found power is compounded many fold when viewe

in light of the fact that many large newspapers may be subject to a hundred or more separate local jurisdictions including counties and cities where the newspaper is circulated. It is difficult to really conceive of the wide-ranging ramifications of the Court's decision. However, it can be anticipated that those governmental bodies whose activities demand the greatest exposure will be the most ingenious in devising ways to strike at the economic heart of the press.

This clear and alarming impact of the Court's decision on the vitality, if not the very existence, of a free press demonstrates the error of the holding that the combination of protected editorial judgment and unprotected want-ads reduces the combination thereof to an unprotected "commercial statement".

2. This Court should not permit the narrow factual circumstances of *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to stand for the blanket proposition that all commercial speech has no First Amendment protection.

It is respectfully submitted that *Valentine*, when read in conjunction with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), should not permit the overly simplistic conclusion that commercial speech has no First Amendment protection. In *Valentine*, the court stated that the extent to which a person may promote or pursue a gainful occupation in the streets and to what extent such activity shall be adjudged a derrogation of the public right of the user, are matters of legislative judgment. The thrust of the two decisions seems to be that where the end result of the publication is for a commercial or business purpose or for economic gain, the publication is not entitled to protection. The Court seems to look at the purpose of

the publication rather than the fact that it is a publication paid for at the expense of the advertisers in deciding whether or not it is commercial speech. In *Valentine*, the Court found the purpose of the publication was for economic gain of the advertiser, and in *Sullivan* the Court found that the purpose was political and social in nature. This is the approach which we respectfully submit is one that overlooks in its entirety the intent of the First Amendment under our economic system. For instance, tenants circulating handbills protesting rental increases by their landlord clearly have for their purpose an economic gain. Union members circulating handbills to the effect that an employer is unfair in not granting wage increases have as their purpose personal, economic gain. These same handbills printed in the form of an advertisement in a newspaper would be for the purpose of economic gain. Would the Court permit the enjoining of such activity? We think not. Help wanted ads often express the opinion of the advertiser relating to social philosophy, and they most certainly communicate information of a most necessary nature to the economic well-being of this county. Indeed, without help wanted ads and other business advertising, the economic system of this country would be seriously jeopardized.

If the content of commercial advertising and the newspaper's control thereof can be regulated, then we submit this Court has condoned the most serious inroad upon a vital and free press and the free exchange of information since this most cherished right was set forth in the First Amendment to our Constitution.

3. The Court erroneously concluded that the order of the Pittsburgh Commission on Human Relations

did not result in a constitutionally impermissible prior restraint on the press. The order is in the nature of an injunction forbidding the exercise of editorial judgment *in futuro*. This Court has permitted an indefinite injunction affecting editorial policy to remain against the Press. We respectfully submit that the Court has overlooked the pragmatic difficulties of operating a newspaper under such conditions. Each and every issue of the Press is covered by this injunction and the Press is exposed to the possibility of a multitude of actions against it for "unlucky guesses" as to the propriety of placing certain advertisements. It was a similar burden placed on newspapers which justified the rationale of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), which rationale was amplified and extended in *Rosenbloom v. Metromedia,* 403 U.S. 29, 50 (1971). It is one thing to state, as the Court does in footnote 14 of its opinion, that a newspaper may rely in good faith on an advertiser's representation regarding coverage, but it is quite another to fail to recognize the pragmatic problems associated with after-the-fact administrative determinations of what action of the newspaper is or is not "good faith". It is difficult to imagine a more invidious design adversely affecting a newspaper's "institutional viability".

4. The Court's reliance on cases upholding regulatory legislation such as *Associated Press v. NLRB,* 301 U.S. 103 (1937), to justify its conclusion that the order does not affect the "institutional viability" of the Press is misplaced. In those cases such as *Associated Press,* the keystone was the fact that the regulations applied equally to newspapers, as well as other firms and entities. Moreover, the purely business function of a newspaper cannot be equated with its edi-

torial function, even though that editorial function is exercised for its readers and the production of income. Certainly, the courts cannot immerse themselves in the quagmire of deciding in each case the "degree" of editorial judgment involved. We submit that the First Amendment is not triggered by such measurement. In this case, the contested order can apply only to newspapers, and in particular to newspapers' editorial discretion on layout and design. For that reason alone, the wisdom of this Court's decision demands reflection.

5. The Commission below proceeded against the Pittsburgh Press rather than against culpable advertisers merely because the Press provided the Commission with a more convenient method of enforcing the Ordinance. This Court through its decision has permitted local agencies to make newspapers their enforcement arms. Indeed, this was the government's position in *United States v. Hunter,* 459 F.2d 205 (4th Cir. 1972), where instead of acting against the advertiser, the government proceeded against the newspaper because "the logical option would be to build a dam at some strategic spot in the flow of publication, such as the newspaper office."[1] Such a holding undermines the historical and necessary disassociation of the press from government. *Chicago Joint Board v. Chicago Tribune Company,* 307 F. Supp. 422 (N.D. Ill. 1969), *aff'd.,* 435 F.2d 470 (7th Cir. 1970), *cert. denied,* 402 U.S. 973 (1971), presented the courts with a question opposite to the one presented herein. There, an advertiser sought entrance to the advertising pages of the newspaper. In holding that no one has the right to have even a political advertisement published by a

[1] United States Pretrial Memorandum, p. 12, filed 1/28/71, *United States v. Hunter,* Civil Action No. 70-816T, D. Md.

newspaper, the courts noted the history of disassociation between the news media and the government. The instant case, however, would seem to seriously imperil that salutary doctrine, for if the state may dictate what type of advertisements cannot go into a newspaper, there is no logical barrier to a state compelling what must go into a newspaper. We believe that this Court, by the instant decision, has provided the states with that intolerable power.

6. The *amicus curiae,* American Newspaper Publishers Association, has authorized counsel to state that it concurs in, and strongly endorses, the grounds hereinabove set forth and most respectfully urges that this petition be granted.

CONCLUSION

For the reasons stated herein, the petitioner, Pittsburgh Press Company, prays that this Court grant its Petition for Rehearing of the June 21, 1973 decision in this case.

CERTIFICATE PURSUANT TO RULE 58(1)

In accordance with Rule 58(1), the undersigned counsel hereby certify that this petition is presented in good faith and not for delay.

Respectfully submitted,

CHARLES R. VOLK
CHARLES WEISS
RALPH T. DESTEFANO
Attorneys for Petitioner

Of Counsel:
ROBERT H. SHOOP, JR.
CARL H. HELLERSTEDT, JR.
THORP, REED & ARMSTRONG
2900 Grant Building
Pittsburgh, Pennsylvania 15219